

OGC HAS REVIEWED.

25 June 1956

MEMORANDUM FOR: General Counsel

SUBJECT: Cole v. Young (U. S. Supreme Court, 11 June 1956)

1. In effect the decision holds:

a. So far as Executive Order 10450 permits dismissal of an employee on a "loyalty" basis regardless of the character of his position in the Government service, and does not require the agency head to make a determination as to the effect that continuation of his employment would have upon the "national security," the Court finds that it goes beyond the authority granted to the President by the Act of 26 August 1950.

b. This is not to say that an employee cannot be dismissed on the basis of "loyalty" charges. Such charges may justify his dismissal if the procedure followed is that of the Civil Service Act or the Veterans Preference Act as appropriate. In addition, the procedures prescribed by the Executive Order may be followed, if the employee's position has been found by the agency head to be "sensitive;" i.e., a position in which the employee could adversely affect the "national security."

2. Cole was a food and drug inspector for the Department of Health, Education and Welfare. He held a position in the classified Civil Service. The Secretary of that department reached a final determination that his continued employment was not "clearly consistent with the interests of national security" and ordered the termination of his employment. The statement of charges alleged that he had "a close association with individuals reliably reported to be Communists" and that he had maintained a "sympathetic association" with, had contributed funds and services to and had attended social gatherings of an allegedly subversive organization.

Cole appealed his discharge to the Civil Service Commission under the Veterans Preference Act. The Commission declined to accept the appeal and Cole brought this action. The District Court and the Court of Appeals ruled for the Government. The Supreme Court, in a decision handed down on 11 June 1956, held for Cole, reversing the judgment of the Court of Appeals and remanding the case to the District Court for further proceedings consistent with its decision.

3. The reason the Civil Service Commission declined to hear Cole's appeal is that the Act of 26 August 1950, where applicable, supersedes the Veterans Preference Act. Consequently, as the Supreme Court phrases it, "The sole question for decision is whether petitioner's discharge was authorized by the 1950 Act."

Although Cole raised the question whether Executive Order 10450 was proper under the terms of the Act, since it extended the provisions of the Act to all departments and agencies of Government in addition to those specifically named in the Act, the Court stated "We will... assume, for purposes of this decision, that the Act has validly been extended to apply to the Department of Health, Education and Welfare."

4. The Court notes: "The general personnel laws, the Lloyd-LaFollette and Veterans Preference Acts authorize dismissals for 'such cause as will promote the efficiency of the service,' and the ground which we conclude was the basis for petitioner's discharge here - a reasonable doubt as to his loyalty - was recognized as a 'cause' for dismissal under those procedures as early as 1942... Thus there was no want of substantive authority to dismiss employees on loyalty grounds, and the question for decision here is not whether an employee can be dismissed on such grounds, but only the extent to which the summary procedures authorized by the 1950 Act are available in such a case."

"The issue turns on the meaning of 'national security' as used in the Act. While that term is not defined in the Act, we think it clear from the statute as a whole that the term was intended to comprehend only those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare."

5. The Court reasons: "There is an obvious justification for the summary suspension power where the employee occupies a 'sensitive' position in which he could cause serious damage to the national security during the delay incident to an investigation and the preparation of charges. Likewise there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information. On the other hand, it is difficult to justify summary suspension and unreviewable dismissals on loyalty grounds of employees who are not in 'sensitive' positions and who are thus not situated where they could bring about any discernible adverse effects on the Nation's security. In the absence of an immediate threat of harm to the 'national security,' the normal dismissal procedures seem fully adequate and the justification for summary powers disappears."

6. The Court further argues that if the Government's position in this case were to be accepted the result could be the effective superseding of the general personnel laws. "For why could it not be said that national security in that sense requires not merely loyal and trustworthy employees, but also those that are industrious and efficient? The relationship of the job to the national security being the same, its demonstrated inadequate performance because of inefficiency or incompetence would seem to present a surer threat to national security, in the sense of the general welfare, than a mere doubt as to the employee's loyalty."

"It follows that an employee can be dismissed 'in the interest of the national security' under the act only if he occupies a 'sensitive' position, and thus that a condition precedent to the exercise of the dismissal authority is a determination by the agency head that the position occupied is one affected with the 'national security'."

The Court then concluded that the Secretary had made no such determination as to the position occupied by Cole and that therefore, Cole's discharge was not authorized by the 1950 Act.

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Assistant General Counsel

JSW.

Dick has an interesting theory that the decision supports our use of DCI's authority in non-security cases. See his memo.

LPH

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